The Toledo Blade Company, Inc. *and* Toledo Newspaper and Printing Graphics Union No. 27N, a/w Graphic Communications International Union, AFL–CIO. Case 8–CA–33734

October 28, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

Upon a charge filed by Toledo Newspaper and Printing Graphics Union No. 27N, affiliated with Graphic Communications International Union, AFL–CIO (the Union), the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on March 31, 2003, alleging that the Respondent, The Toledo Blade Company, Inc., violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by unilaterally changing the disciplinary policy for its pressroom employees. The Respondent filed a timely answer to the complaint, denying that its conduct violated the Act.

On August 12, 2003, the parties jointly moved to transfer the proceedings to the Board, without benefit of a hearing before an administrative law judge, and submitted a proposed record consisting of the formal papers and the parties' stipulation of facts with attached exhibits. On January 21, 2004, the Executive Secretary, by direction of the Board, issued an order granting the motion, approving the stipulation, and transferring the proceedings to the Board. Thereafter, the Respondent, the Union, and the General Counsel filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record in the case, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, The Toledo Blade Company, Inc., an Ohio corporation, with an office and place of business in Toledo, Ohio, is engaged in publishing a daily and Sunday newspaper. In the course and conduct of its business operations, the Respondent annually derives gross revenues in excess of $200,000 and holds membership in or subscribes to various interstate news services, publishes various syndicated features, and advertises nationally sold products. The parties stipulated, and we find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICE

The issue presented is whether the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing a work rule and a disciplinary policy for its pressroom employees.

A. Facts

Based on Section 9(a) of the Act, the Union is the exclusive collective-bargaining representative for employees in the following appropriate bargaining unit:

> All pressroom employees, who work in pressrooms operated by the Respondent, and on all printing presses employed in the pressroom, including but not limited to gravure, offset and letterpress printing presses and associated devices, but excluding all office clerical employees, guards, and supervisors as defined in the Act.

The Respondent's recognition of the Union has been embodied in successive collective-bargaining agreements, the most recent of which was effective from March 22, 1995, to March 21, 2003.

On May 24, 1990, the Respondent issued the following rule for unit employees:

> The production man in charge shall assign at the beginning of each shift a unit or units of responsibility to members of the operating crew.
>
> It shall be their responsibility to ensure the quality of the pages in their assigned unit(s).
>
> This is to include *but not limited to* the following deficiencies: 1) Blank or partially printed sheets, 2) ink spills on paper, 3) compensation (cutoff), 4) filled in type or smutting resulting from plate swell, 5) dirty or incorrect ink, 6) turnovers and torn sheets, 7) register and/or any other fault that lessens print reproduction or quality.[1]

Between November 1990 and December 1999, the Respondent issued 17 disciplines pursuant to this rule.[2] These disciplines conformed to the Respondent's prac-

[1] Exh. 2. (Emphasis in original.)

[2] Thirteen of the discipline forms specify that the person disciplined was the person responsible for the unit (Exhs. 3–5, 8, and 10–18). The remaining four discipline forms do not indicate whether the individual disciplined was the individual with responsibility for the unit (Exhs. 6–7, 9, and 19). In the parties' motion to transfer the proceeding to the board and stipulation of facts, they listed the disciplines reflected in all 17 of these forms as having been issued for violations of the May 24, 1990 rule.

tice of progressive discipline.[3] In addition, in 1994, discipline was imposed on employees Al Davis and Keith Finley when plates were run in the wrong position. Davis and Finley were responsible for the units involved. The Respondent issued Davis a first written warning for neglect of duty. It issued Finley a 2-day suspension because it was his third offense for neglect of duty. Grievances over these disciplines went to arbitration; the arbitrator denied the grievances and upheld the Respondent's decision to discipline Davis and Finley and to apply progressive discipline.[4]

On March 31, 2001, an error occurred on unit 59 in which the plates for two pages were transposed. On that shift, Finley was the man-in-charge, Frank Hayden was assigned to unit 59, and seven other employees were assigned to other units. Hayden was suspended for 3 days, and first written warnings were given to Finley and six of the seven other employees.[5] The Union grieved, contending that these disciplines did not follow the Respondent's May 24, 1990 memo (1990 memo) and its policy of progressive discipline.[6] The grievance went to arbitration, and Arbitrator Nels Nelson ordered the Respondent to reduce Hayden's suspension to a first written warning and to rescind the warnings given to the other employees.[7] He found:

> there is a clear and consistent practice or custom regarding discipline for the routine errors that take place. First, whenever an error occurs on a unit, only the person responsible for the unit receives discipline. Second, the employee who is deemed responsible receives progressive discipline consisting of a first warning, a second written warning, and a suspension.

The arbitrator concluded that "the pressmen . . . believed that the consequence of failing to catch an error was progressive discipline for the person responsible for the unit where the error occurred," and that the Respondent had provided no notice of any change in its penalties.[8]

On July 23, 2002, Barbara Gessel, the Respondent's director of human resources and labor, sent a letter to Finley, who was the Union's president, in which she stated:

> At this time, I am notifying the Union that the Company is rescinding the May 24, 1990 memorandum from former Superintendent, John Buczkowski regarding the responsibility of members of an operating crew to ensure the quality of the pages on their assigned unit(s). It should be clearly understood from this time forward that the Company holds all pressmen on a shift responsible for checking the entire paper and will not limit discipline to the person assigned to a particular unit or units where the error occurs. The appropriate level of discipline will be determined on a case-by-case basis.[9]

In response to this letter, union representatives met with management and told them that the Union did not agree to the unilateral change to the disciplinary system. Counsel for the Union also contacted Gessel by phone about the disciplinary policy change and followed up with a September 25, 2002 letter.[10] On October 2, 2002, Gessel responded, stating in part: "Please allow this to serve as a second formal notice that the Company will proceed with future discipline as outlined in our letter to you dated July 23, 2002."[11] In that same letter, the Respondent again announced that in the future the appropriate level of discipline would be determined on a case-by-case basis, and that it would not necessarily conform to the practice of progressive discipline as described by the disciplines in Exhibits 10–19, discussed above.

B. Contentions of the Parties

The Respondent argues that it has always had the ability to hold all involved pressmen responsible from a disciplinary standpoint and that it did not modify the disciplinary system, but merely clarified who was responsible and potentially subject to discipline. It claims that it was merely providing the notice that Arbitrator Nelson found lacking in his 2002 arbitration decision. The Respondent asserts that progressive discipline does not always need to start with a verbal or written warning and is not violated by looking at issues on a case-by-case basis. It also

[3] The progressive discipline practice, as described in the latest version of the "Corrective Discipline Action" form, provided for "First written warning," "Second written warning," and "Disciplinary suspension for__days and Final warning," which could lead to additional disciplinary action, up to and including discharge (Exhs. 10–19). Under this practice, discipline over 2 years old is not considered.

[4] Exh. 21.

[5] A written warning was given to the seventh employee, but it was later rescinded. Although the seven employees were not assigned to the unit in which the error occurred, the Respondent issued them warnings because they "were part of the crew on #50 press and should have caught the error before 13,320 papers were run" [Exh. 28].

[6] Under progressive discipline, Hayden should have received a first written warning, as it was his first offense. Under the 1990 memo, the six employees should not have been disciplined because they were not in charge of the unit.

[7] The arbitration hearing was held on March 18, 2002. Arbitrator Nelson issued his decision on June 19, 2002.

[8] Exh. 40.

[9] Exh. 41.

[10] Exh. 42.

[11] Exh. 43.

asserts that the actions at issue here are not significant or material changes in terms or conditions of employment.[12]

The General Counsel argues that the Respondent's institution of a new system of discipline is a significant and material change in working conditions, requiring notification and an opportunity to bargain prior to institution. The General Counsel contends that the Respondent provided no opportunity to bargain over the changes, but presented the Union with a fait accompli.

The Union contends that the Respondent made two unilateral changes in employee terms and conditions of employment. First, it rescinded its longtime disciplinary rule of holding only the pressmen in charge of a unit responsible for the quality of pages in their assigned units and replaced it with one under which all employees working on the shift could be held responsible for a mistake on one of the units. Second, the Respondent rescinded its progressive discipline policy and replaced it with a policy of determining the level of discipline on a case-by-case basis. The unilaterally implemented changes were not a mere clarification, the Union asserts, but significant deviations from the way discipline had been administered for mistakes in the past.

C. Discussion

Section 8(a)(5) of the Act requires an employer to provide its employees' representative with notice and an opportunity to bargain before instituting changes in any matter that constitutes a mandatory bargaining subject. *NLRB v. Katz*, 369 U.S. 736 (1962). However, a unilateral change in a mandatory subject of bargaining is unlawful only if it is a "material, substantial, and significant change." *Flambeau Airmold Corp.*, 334 NLRB 165 (2001), quoting *Alamo Cement Co.*, 281 NLRB 737, 738 (1986), modified on other grounds 337 NLRB 1025 (2002).

In this case, the Respondent stipulated that it did not give the Union notice and an opportunity to bargain over its July 23, 2002 announcement rescinding the policies expressed in the 1990 memo. The issues before us, therefore, are (1) whether the disciplinary policy and the work rule set out by the 1990 memo are mandatory subjects of bargaining; (2) if so, whether the Respondent's actions actually made changes in those policies; and (3) if so, whether the changes had a material, substantial, and significant impact on the employees' terms and conditions of employment. As explained below, we find that the work rule and disciplinary policy are mandatory subjects of bargaining, that the Respondent in fact changed the rule and policy, and that the changes are material, substantial, and significant. Therefore, we find that the Respondent violated Section 8(a)(5) and (1) as alleged.

1. Disciplinary policies and work rules are mandatory subjects of bargaining

It is well established that an employer's disciplinary system constitutes "a term of employment that is a mandatory subject of bargaining." *Migali Industries,* 285 NLRB 820, 821 (1987) (progressive discipline system held to be mandatory subject of bargaining); *Electri-Flex Co*., 228 NLRB 847 (1977) (written warning system of discipline held to be mandatory subject of bargaining), enfd. as modified 570 F.2d 1327 (7th Cir. 1978), cert. denied 439 U.S. 911 (1978). The Respondent's action in the instant case involves its system for administering discipline to employees for errors in unit work, be it progressive discipline or case-by-case discipline. Such a system constitutes a mandatory subject of bargaining under the precedent discussed above.

It is equally well settled that "work rules, especially those involving the imposition of discipline, constitute a mandatory subject of bargaining." *Cotter & Co*., 331 NLRB 787, 796 (2000). Here, the Respondent's July 23, 2002 letter (2002 letter) stated that all pressroom employees on a shift were subject to discipline in the event an error occurs. The 2002 letter clearly set forth a work rule involving the imposition of discipline and is, therefore, a mandatory subject of bargaining.

2. The Respondent changed its disciplinary policy and work rule

The documents in this case and the past practice between the parties indicate that the Respondent changed its progressive discipline policy to a policy of discipline on a case-by-case basis. The disciplines issued under the 1990 memo followed a system of progressive discipline. In the 1994 discipline of Davis and Finley, the Respondent applied progressive discipline, and the arbitrator upheld the Respondent's decision to apply such discipline. Indeed, the Respondent's brief to the arbitrator in the 1994 Davis/Finley arbitration stated: "The Company's use of progressive discipline principles is likewise well established and mutually recognized."[13]

The Respondent's 2002 letter, however, announced that "[t]he appropriate level of discipline will be determined on a case-by-case basis." By determining the level of discipline solely on the basis of a single current case, the 2002 letter substantively changed the previous progressive discipline policy, which considered a current case of discipline in the context of past discipline cases.

[12] The Respondent does not argue that the Union waived its right to bargain over the conduct in issue in this case.

[13] Exh. 20.

Similarly, the record shows that the Respondent changed its work rule governing which employees would be held responsible for an error. As noted above, in its 1990 memo, the Respondent had placed responsibility for an error on the pressmen who were in charge of the unit where the error occurred. The 1990–1999 disciplines discussed above, including the 1994 discipline of Davis and Finley, imposed discipline only on the person in charge of the unit where the error occurred. In the 2002 letter, however, the Respondent stated that it was "rescinding the May 24, 1990 memorandum . . . regarding the responsibility of members of an operating crew to ensure the quality of the pages on their assigned unit(s)." The Respondent continued: "It should be clearly understood from this time forward that the Company holds all pressmen on a shift responsible for checking the entire paper and will not limit discipline to the person assigned to a particular unit or units where the error occurs." Beyond question, the Respondent's 2002 letter greatly expands the type of conduct and the number of employees subject to discipline for errors and thus is a substantive change from the policy set forth in the 1990 memo.

The Respondent argues that it has always had the authority to impose discipline on all pressmen involved in an error and that its 2002 letter merely clarifies this authority. However, the Respondent's February 1994 brief to the arbitrator in the Davis/Finley grievance undercuts this argument. This brief, in a discussion about the 1990 memo, stated as follows:

> These unit man responsibilities were reiterated in a meeting with Union officials on February 27, 1992 to discuss Pressman Brad Thatcher's misplating of plates on the unit for which Keith Finley was responsible. It was agreed and understood by the Union officials that Keith Finley, as the unit man in charge of his unit, was responsible for the misplating and would receive discipline accordingly. Thereupon, Finley was issued a written verbal warning for the misplating.

The Respondent also stated in that brief: "The Company is neither contractually restricted nor unreasonable in implementation of its rule holding unit men accountable for the operation of their units."[14]

The testimony of the Respondent's witnesses at the 2002 arbitration hearing concerning the discipline imposed for the March 31, 2001 mistake on unit 59 shows that the past practice was to impose discipline only on the person responsible for the unit where a mistake occurred and that progressive discipline had been followed. In this regard, Larry Sommers, the plant superintendent, testified that there had never been an incident in which the entire crew was disciplined for a production error and that he could not recall a pressman ever receiving a suspension for a first mistake on a unit. James Frederick, production director, also testified that he was not aware of any time that an entire crew had been disciplined for a mistake and that Frank Hayden was the first pressman suspended for a first mistake.

For all of these reasons, we find that the policy the Respondent announced in its 2002 letter was a change from its progressive discipline policy and from the work rule set forth in its 1990 memo.

3. The changes made by the Respondent were material, substantial, and significant

As noted above, a unilateral change in a mandatory subject of bargaining is unlawful if it is "material, substantial, and significant." *Flambeau Airmold Corp*., supra. "The Board has long held that an employer is not obligated to bargain over changes so minimal that they lack such an impact." *W-I Forest Products Co*., 304 NLRB 957 (1991) (citing *Rust Craft Broadcasting*, 225 NLRB 327 (1976)). As discussed above, the Respondent's 2002 letter changed both the scope of the discipline and the method for determining the level of discipline to be applied: all employees on a shift are now subject to discipline for an error rather than only the person in charge of the unit where the error occurred, and the discipline imposed is to be decided on a case-by-case basis, rather than pursuant to a progressive disciplinary system. As a result of the changes, an increased number of unit employees are subject to discipline whenever a work error occurs, and the Respondent's choice of discipline is not restricted to the four-step progressive discipline procedure. Thus, we find that those changes had a material, substantial, and significant impact on the employees' terms and conditions of employment.

D. Conclusion

Because the Respondent's work rules and disciplinary policies are mandatory subjects of bargaining, and because the Respondent changed a work rule and a disciplinary policy, with a resulting material, substantial, and significant impact on its pressroom employees' terms and conditions of employment, we conclude that the Respondent violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

[14] Exh. 20.

3. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally, without notifying and bargaining with the Union, changing a work rule and disciplinary policy for its pressroom employees.

REMEDY

Having found that the Respondent has engaged in an unfair labor practice, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) of the Act by unilaterally, without notifying and bargaining with the Union, changing a work rule and disciplinary policy for its pressroom employees, the Respondent shall be ordered, upon the request of the Union, to rescind the unilateral changes found herein. The Respondent shall also be ordered to notify, and upon request, bargain with the Union, as the exclusive collective-bargaining representative of its pressroom employees, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees.

ORDER

The National Labor Relations Board orders that the Respondent, The Toledo Blade Company, Inc., Toledo, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Toledo Newspaper and Printing Graphics Union No. 27N, affiliated with Graphic Communications International Union, AFL–CIO, as the duly designated representative of its employees in the appropriate bargaining unit, by making unilateral changes to its work rules and disciplinary policy.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request of the Union, rescind the unilateral changes found herein.

(b) Before implementing any changes in wages, hours, or other terms and conditions of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All pressroom employees, who work in pressrooms operated by the Respondent, and on all printing presses employed in the pressroom, including but not limited to gravure, offset and letterpress printing presses and associated devices, but excluding all office clerical employees, guards, and supervisors as defined in the Act.

(c) Within 14 days after service by the Region, post at its facility in Toledo, Ohio, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 23, 2002.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form proscribed by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with Toledo Newspaper and Printing Graphics Union No. 27N, affiliated with Graphic Communications International Union, AFL–CIO, as the duly designated representative of our employees in the unit set forth below, by unilaterally changing our work rules and disciplinary policy.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, on request of the Union, rescind the work rule and disciplinary policy we unlawfully implemented for unit employees.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

> All pressroom employees, who work in pressrooms operated by us, and on all printing presses employed in the pressroom, including but not limited to gravure, offset and letterpress printing presses and associated devices, but excluding all office clerical employees, guards, and supervisors as defined in the Act.

THE TOLEDO BLADE COMPANY, INC.